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IN THE

Supreme Court of the United States

OCTOBER TERM 1984

MARY NELL SCHMIDT

versus

CITY OF FAYETTEVILLE

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Mary Nell Schmidt,
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38 R

QUESTIONS PRESENTED

Whether the Court of Appeals for the Fourth Circuit erroneously applied Rule Sixteen of the Federal Rules of Civil Procedure in such a manner as to prejudice the petitioner's case.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1984

MARY NELL SCHMIDT

versus

CITY OF FAYETTEVILLE

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Mary Nell Schmidt petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (App. B, infra, 8a) is unreported. The opinion of the District Court (App. A, infra, 1a-7a) is not reported.

JURISDICTION

The judgment of the Court of Appeals was entered on June 13, 1984. A petition for rehearing was denied on July 17, 1984. On September 4, 1984, the Chief Justice extended the time within which to file a petition for a writ of certiorari to November 13, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

CONSTITUTIONAL PROVISIONS INVOLVED

1. The Fifth Amendment to the United States Constitution provides in relevant part:

No person shall be. . . deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use without just compensation.

2. The Fourteenth Amendment to the United States Constitution provides in relevant part:

. . . nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT

1. A serious error by the United States Court of Appeals for the Fourth Circuit involving Rule Sixteen of the Federal Rules of Civil Procedure has resulted in the exclusion of evidence demonstrating severe zoning discrimination, in violation of the Fourteenth Amendment to the United States Constitution, on the basis that the pretrial order failed to address such an issue. The preclusion has resulted in serious prejudice to Ms. Schmidt, the petitioner.

This is a case involving application of a residential zoning classification to a triangular lot that lies between two major truck route highways, one a four lane boulevard and the other a heavily traveled two lane road. The highways form into a stoplight intersection at the apex of the triangle through which pass approximately twenty-five thousand vehicles daily. Additionally both highways are on a slight gradient so that vehicular noise is intensified beyond that which ordinarily would be expected.

The original residential zoning classification of many years ago, which applied to an area then sparsely populated, remains in force today even though massive business,

residential and highway development has precluded any use of the house on the triangular lot as a residence. In fact, no use has been made of the property since 1978 when Ms. Schmidt could no longer tolerate the effects of the bombardment and moved out.

Even though there are twenty-six "similarly situated" triangular properties within the City of Fayetteville that lie between two major highways, and of these twenty-five are zoned for uses other than residential, the City refused to rezone the petitioner's property. With no way to turn, Ms. Schmidt was forced to seek judicial relief and submitted a complaint to the United States District Court for the Eastern District of North Carolina, seeking a Declaratory Judgment and damages, with, among others, the following contention:

> That the City of Fayetteville, through its enforcement of the municipal zoning ordinance with respect to Plaintiff's property and through its City Council's refusal to amend the municipal zoning ordinance with respect to Plaintiff's property, denies Plaintiff any reasonable, economically viable use of her property; that the City of Fayetteville, under Color of State Law, has deprived the Plaintiff of her right not to be deprived of her property without just compensation therefore and without due process of law, as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution.

After the close of discovery, Ms. Schmidt's proposed pretrial order showed that the "Plaintiff contends that the legal issues are as follows:

> Has the Defendant, City of Fayetteville, under color of state law, through its enforcement of the municipal zoning ordinance with respect to Plaintiff's property and through its City Council's refusal to amend the municipal zoning ordinance with respect to Plaintiff's property, denied the Plaintiff any reasonable, practical and desirable use of her property so as to deprive the

**Jurisdiction of the District Court was invoked pursuant to 28 U.S.C. § 1343 (3), 42 U.S.C. § 1983, and 42 U.S.C. § 1988.*

> Plaintiff of her property without just compensation therefore and without due process of law in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States?

Obviously, this was not a judicially determined issue as Rule Sixteen requires. There never was judicial assistance with development of the issues contained in the proposed pretrial order.

Section "III. EXHIBITS" of the same proposed pretrial order showed Ms. Schmidt offering the "Analysis of triangular lots and property as to zoning status within the City of Fayetteville derived from the zoning map of the City of Fayetteville" and Section "V. PENDING MOTIONS", stated that both parties had motions for Summary Judgment pending.

Throughout Ms. Schmidt's Brief in Support of the Motion for Summary Judgment are references to zoning discrimination. For example, page six of the Brief states:

> In addition, the clear recognition of the undesirability of triangular lots bordered by major traffic arterials for residential purposes is most clearly demonstrated by the treatment of similar properties located in the City of Fayetteville as is shown on Attachment "A" to Ms. Schmidt's affidavit. It is shown there that 25 of 26 similarly located tracts in the City of Fayetteville are zoned for commercial or industrial use. The Plaintiff's property is the only piece of property zoned for residential usage.

After referring to *MacRae v. City of Fayetteville,* 198 N.C. 51, 150 S.E. 810 (1929) where the Supreme Court of North Carolina struck down an ordinance to prevent the construction of a gasoline station within 250 feet of a residence when evidence showed that 23 of 24 gas stations in the City were already within 250 feet of residences, the brief went on to state: "As in *MacRae,* such *discriminatory* actions against Plaintiff are inimical to justice and equal protection of the

laws." (Page eight) (emphasis added).

Finally on page two of the "Plaintiff's Trial Memorandum", reference was made to the testimony of Michael Schmidt, Ms. Schmidt's son, as including "an analysis of similarly situated properties and their current zoning."

At trial before the District Court the evidence of zoning discrimination was met with objection by the defendant as not being within the issue of the pretrial order and the Honorable Judge Earl Britt stated:

> I thought you were seeking to get this Court to say that they had taken your client's property without just compensation.
>
> Plaintiff: Yes, your Honor. And our prayer for relief says, therefore, we ask for declaration that the ordinance is unconstitutional and therefore, is unenforceable against this particular property, is what this prayer for relief says. Is that it be declared null and void as applied to this particular piece of property.
>
> And we would argue that 26 similarly situated properties there are 26 properties similarly situated to that of the Plaintiff's, and 25 of them are treated drastically different from the Plaintiff's is fundamentally relevant for this Court to consider in determining the due process argument made in this case.
>
> The Court: Mr. Weaver (Counsel for Defendant), He does allege it. *I had missed that.* I thought that we had about all agreed that this was an action for inverse condemnation but. . . (emphasis added).

Judge Britt admitted the evidence but then stated ". . . but secondly your contentions in your pretrial order does not set forth at all any contention that the ordinance should be used (sic) as unconstitutional and applied to your client. And the local rules of this Court provides that any contention not set forth in the pretrial order are deemed abandoned. But we'll get to that in due course. . ." (Tr. Vol. 2, page 11).

Unfortunately, Judge Britt did not get to it in due course. Although the Judge received the evidence of zoning discrimination at trial he refused to address the issue presented by the evidence. Ms. Schmidt contends this neglected portion of the case encompassed the most important evidence presented to the Court other than the property configuration, location and traffic counts.

On appeal to the United Stated Court of Appeals for the Fourth Circuit, the Defendant contended that "(i)n the pretrial order, Mrs. Schmidt did not preserve the issue of unconstitutionality of the ordinance as applied to her property". (Brief for Appellee, page 6) And that "Appellant did not allege zoning discrimination in the pleadings or pretrial order and is precluded from raising the issue on appeal". (Brief for Appellee, page 13)

The panel for the Fourth Circuit concluded that "the appellant was precluded from raising at trial, and therefore may not raise on appeal, issues which were not raised in the pre-trial order or an amended pre-trial order".

REASONS FOR GRANTING THE PETITION

1. The pretrial order in *Schmidt v. City of Fayetteville* was not a pretrial order within the meaning of Rule Sixteen of the Federal Rules of Civil Procedure. Rule Sixteen envisions that *the court* is to assist in the formulation of the issues for trial by expressly stating: "The court shall make an order. . . which limits the issues for trial. . ." The Fourth Circuit acknowledges that Rule Sixteen holds out to the lawyer "that an experienced judge (or magistrate) stands ready to help him frame the issues". *McCargo v. Hedrick* 545 F.2d 393, 397 (4th Cir. 1976); See also, *Padovani v. Bruchhausen,* 293 F.2d 546 (2d Cir. 1961) ("The benefits. . . from carefully conducted pre-trial proceedings. . . require diligent efforts of both court

and counsel. . . For success the leadership, direction, and stimulus of the judge are vital". at 550). Not every document labeled as a "pretrial order" is a pretrial order within the meaning of Rule Sixteen, as Judge James Dickson Phillips of the Fourth Circuit explains in discussing how Rule Sixteen contemplates formulation of the issues for a trial:

> Further, it (Rule Sixteen) provides that "*such* an order when entered controls the subsequent course of the action, unless modified at trial to prevent manifest injustice." Fed. R. Civ. P. 16 (emphasis added). But "such" an order, within the most obvious meaning of Rule 16, is one in which a *judicial* determination of the issues remaining for trial has been made. *See Life Music, Inc. v. Edelstein,* 309 F.2d 242, 243 (2d Cir. 1962) (per curiam).
>
> Without attempting exhaustive analysis of the whole document here, we can only say that the pretrial order entered in this case is not such an order. It contains no specification of the issues for trial as determined by the pretrial judge. Presumably following the local rule format, it does contain a recitation of "the triable issues as contended by (the respective parties)." While stating the issues in this way as party contentions may sometimes fairly serve the superseding function contemplated by Rule 16 for a *judicial* determination of *the* issues, the hazards of ambiguity and resulting surprise are great. The statements of opposing contentions and the resulting difficulty in this case perfectly illustrate the hazards. A "ships passing in the night" allusion is irresistible. *Matter of Intercontinental Properties Management,* 604 F.2d 254, 259, 260 (4th Cir. 1979).

(a) The pretrial order in the instant case did not contain a *judicial* determination of the issues as can be seen by a comparision of the wording of Ms. Schmidt's complaint and her pretrial order. Because it is not *such* an order within the meaning of Rule Sixteen, it falls squarely within the language Judge Phillips used in *Intercontinental Properties.*

(b) Since the pretrial order issue as proposed by Ms. Schmidt alleged violation of the Fourteenth Amendment which contains both protection for due process and equality before the law, it is only natural that she considered the pretrial order to have preserved first, allegations of the unconstitutionality of the Defendant's ordinance, and secondly the discriminatory effects or it. Actually, the District Court had three sources of pretrial material showing allegations of zoning discrimination: (1) the "Exhibits" section of the proposed pretrial order, (2) the pending Summary Judgment Brief and Affidavits, and (3) the "Plaintiff's Trial Memorandum". If the Court felt Ms. Schmidt's proposed issue to be insufficient, it had the responsibility to further sharpen and crystalize the issues to be tried. *Trujillo v. Uniroyal Corp.*, 608 F.2d 815, 817 (10th Cir. 1979); 3 Moore's *Federal Practice,* Section 16.11 (1984) [even amended Rule Sixteen contemplates that the issues are to be crystallized under the "mediation of the court".] The failure to do so in this case has resulted in "ships passing in the night".

The pretrial order of Rule Sixteen should not be a devise to reinstitute the evils of special pleading for "if there is any characteristic of the federal rules...which is well settled, it is that a plaintiff pleads facts and not law and that the law is to be applied by the court." *Padovani v. Bruchhausen,* supra at 549.

(c) Moreover the *whole* pretrial order should be considered, not merely the wording of the issue. *See In Re Aircrash in Bali, Indonesia on April 22, 1974,* 684 F.2d 1301 (9th Cir. 1982) at 1314; *Deakyne v. Commissioners of Lewes* 416 F.2d 290 (3rd Cir. 1969) fn 12. A reading of Ms. Schmidt's whole pretrial order shows factual allegations of zoning discrimination. It is well established that the pretrial order should be "liberally construed to permit evidence and theories at trial that can fairly be said to be embraced within its language". *United*

States v. First National Bank of Circle, 652 F.2d 886 (9th Cir. 1981); *Lake Tahoe Sailboat Sales v. Douglas County,* 566 F. Supp. 308, 209 (1983).

Apparently legal theories and contentions may also be derived from other pretrial documents such as the pretrial memorandum, *Price v. Inland Oil Co.,* 646 F.2d 90, 96 (3d Cir. 1981); Wright and Miller, *Federal Practice and Procedure,* Section 1527 (pretrial memorandum may achieve the purposes of Rule Sixteen in framing the issues), and briefs supporting motions prior to trial. See *Stone v. First Wyoming Bank N.A., Lusk,* 625 F.2d 332, 348 (10th Cir. 1980) (legal theory derived from brief in resistance to Plaintiff's Motion in Limine). The point is that Ms. Schmidt's Pretrial Memorandum, and Brief Supporting Plaintiff's Motion for Summary Judgment, in combination with the pretrial order, not only alleged that the municipal zoning ordinance as applied to her property was unconstitutional, but also maintained the theory of zoning discrimination.

Because of these reasons, the panel for the Fourth Circuit has made a serious mistake in maintaining that the issue of zoning discrimination was not to be considered. This mistake excluded consideration of the premier evidence in Ms. Schmidt's case to her extreme prejudice because "discriminatory zoning. . . is the anti-thesis of land-use control. . ." *Penn Central Transportation Co. v. New York City,* 438 U.S. 104, 132 (1978).

In using various documents to determine the true contentions between the parties the federal court, while protecting a party from surprise, nevertheless should proceed to the merits of an action in order to fulfill the mandate of Rule One of the Federal Rules of Civil Procedure which calls for a just determination of every action. *See generally, United States v. First National Bank of Circle,* 652 F.2d 882 (9th Cir. 1981).

(d) Ms. Schmidt maintains that the issue of zoning discrimination was inherently contained in the issue as framed in the proposed pretrial order. While the allegation that the zoning ordinance, as applied to her property, violated the Fourteenth Amendment is broad, the Fourteenth Amendment guarantees equal protection of the laws. This position is illustrated by the case of *Stone v. First Wyoming Bank,* 625 F.2d 332 (10th Cir. 1980), where it was contended that the Court of Appeals could not consider the banks "corporate adoption theory" because it was not an expressly worded issue in the pretrial order. (See page 347). The Court concluded that the issue was inherently part of the case based on the following things: (1) a liberal construction of the pretrial order (2) reference to other pretrial documents that touched on the theory and (3) evidence admitted at trial related to such a theory of recovery. *See also, Lake Tahoe Sailboat Sales v. Douglas County,* 566 F. Supp. 308 (D.C. Nev. 1983).

2. When evidence beyond the scope of the pretrial order is admitted at trial without objection, it is recognized that the liberal standard of Rule Fifteen (b) of the Federal Rules of Civil Procedure applies, making amendment to the pleadings mandatory.

> If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits." Federal Rules of Civil Procedure, Rule Fifteen (b).

The policy of Rule Fifteen is that claims should be decided on their merits rather than adhering too rigidly to rules of procedure. *Hardin v. Manitowoc-Forsythe Corp.,* 691 F.2d

449, 457 (10th Cir. 1982). Therefore, Rule Fifteen allows for amendments to pleadings in order to conform them to evidence presented. Evidence presented at trial that may range beyond the scope of the pretrial order may be sufficient reason to amend that order under the provisions of Rule Fifteen (b). See *Hardin v. Manitowoc-Forsythe Corp.*, supra at 456. A burden is placed upon the party opposing the amendment to show actual prejudice. *Deakyne v. Commissioners of Lewes,* 416 F.2d 290, 299 (3d Cir. 1969). "Thus, a claim of surprise that is not borne out by the facts or an objection to a mere technical addition to the theory of the claim for relief or the facts on which it is based or a change in the nature of the defense typically will not entail sufficient prejudice to warrant the denial of a motion to amend". Wright & Miller, *Federal Practice and Procedure,* Section 1495 (1971).

It has been stated by the Fourth Circuit that the spirit of freely amending pleadings expressed in Rule Fifteen also applies to the pretrial order of Rule Sixteen. *Maryland Casualty Co. v. Rickenbaker,* 146 F.2d 751, 753 (4th Cir. 1944). Thus even where a party objects to evidence as being beyond the scope of the pretrial order, "amendment may still be allowed unless the objecting party satisfies the court that he would be prejudiced by the amendment". *Hardin v. Manitowoc-Forsythe Corp.,* supra, at 457. In fact when the policy of Rule Fifteen (reaching the merits) overshadows that of Rule Sixteen (prevention of unfair surprise) many courts have permitted *de facto* amendment of the pretrial order. See e.g., *Perfection-Cobey Co. v. City Tank Corp.,* 597 F.2d 419 (4th Cir. 1979); *Deakyne v. Commissioners of Lewes,* 416 F.2d 290 (3d Cir. 1969), *Interstate Plywood Sales Co. v. Interstate Container Corp.,* 331 F.2d 449, 452 (9th Cir. 1964).

The working relationship of Rules Fifteen and Sixteen at times allow for amendment of the pretrial order even on appeal, to conform to the evidence that actually has been

introduced during the trial. *Jackson v. Atlantic Coast Line R.R.*, 317 F.2d 95 (4th Cir. 1963); 6 Wright and Miller, *Federal Practice and Procedure,* Section 1527 at 613. In Ms. Schmidt's case, evidence of zoning discrimination was allowed into evidence over objection and the defendant failed to demonstrate that the evidence was prejudicial. Under such circumstances it would appear that there was a *de facto* amendment of the pretrial order. Otherwise, the proponent of the evidence has no warning that a motion pursuant to Rule Fifteen (b) is needed.

When the trial court accepts such evidence and then refuses to consider it, fertile ground is plowed for a procedural trap. This is especially true when a party believes the issue of the pretrial order incorporates such evidence and there is not judicial assistance in developing a proper pretrial order. Illustratively, the case now before the Court is one in which the appellant had no warning that Rule Fifteen (b) provisions may be necessary until after the Court of Appeals had decided the case.

Judge Britt, over objection of the defendant, admitted Ms. Schmidt's evidence showing zoning discrimination. Ms. Schmidt was lulled into an unexpected trap, first because she believed the pretrial order, along with the other pretrial documents, to have made certain that such an issue was properly before the Court and secondly because the District Court had accepted the evidence. Thus it was never apparent that an amendment was in order. Further, it has been held that the "(f)ailure formally to amend the pretrial order is not an error where the court admits evidence to the same extent as if the order had been amended", and therefore an erroneous pretrial order may be amended even after trial. *Deakyne v. Commissioner of Lewes,* 416 F.2d 290, 297 (3rd Cir. 1969) at fn 12. Even when there is a failure to move for an amendment of the pretrial order, consideration of an issue is not precluded

on appeal. *Perfection-Cobey Co. v. City Tank Corp.*, 597 F.2d 419 (4th Cir. 1979); *O'Neill v. United States*, 411 F.2d 139 (3d Cir. 1969) (plaintiff raised a state statute for the first time on appeal).

Evidence objected to, as beyond the scope of the pretrial order may still be allowed unless the opposing party shows that prejudice will result. Failure to show prejudice leaves only the remedy to seek a continuance. *Hardin v. Manitowoc-Forsythe Corp.*, 691 F.2d 449, 457 (10th Cir. 1982). Prejudice in this context usually refers to catching an opponent off guard by his lack of being aware of the issue. *See e.g., Davis v. Piper Aircraft Corp.*, 615 F.2d 606, 613 (4th Cir. 1980). The court must evaluate prejudice, however, from the standpoint of both parties. *United States v. First National Bank of Circle*, 652 F.2d 882 (9th Cir. 1981). Note however that in this case the defendant had knowledge of the evidence of zoning discrimination from at least three pretrial sources and had every opportunity to prepare to meet such evidence. The prejudice that resulted to Ms. Schmidt is obvious because she believed the issue of zoning discrimination to have been preserved in the pretrial order, it was accepted at trial and then not addressed. Only after the Court issued its unpublished opinion did it become apparent that the issue and evidence was not reviewed by the Court.

In the final analysis, the pretrial order in this case was not "such" an order as required by Rule Sixteen of the Federal Rules of Civil Procedure. Even a "proper" pretrial order is to be

> "liberally construed to cover any of the legal or factual theories that might be embraced by their language". . . [it] is a procedural tool to facilitate the trial of a lawsuit on its merits and not to defeat it on a technicality. We must not allow ourselves to construe the pretrial order in the spirit of a common law pleading. . . The reasons

for avoiding overly technical applications of pretrial orders are amplified when, as in this case, the pretrial order is not properly drawn, is not definitive, specific, complete or detailed.

. . . When an adverse party is content with a boiler-plate pretrial order, it cannot later demand that the trial court enforce it as though it were a specific and meaning-ful narrowing of the issues. *Trujillo v. Uniroyal Corp.*, 608 F.2d 815, 818 (10th Cir. 1979).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Mary Nell Schmidt

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November 1984

APPENDIX A

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF NORTH CAROLINA

FAYETTEVILLE DIVISION

No. 81-78-CIV-3

MARY NELL SCHMIDT, Plaintiff	)
	) MEMORANDUM
vs.	) OPINION
CITY OF FAYETTEVILLE, Defendant	)

On 16 December 1970, plaintiff, Mary Nell Schmidt, purchased a house and lot at the intersection of Morganton Road and Cliffdale Road in the City of Fayetteville for $22,500, intending to use the same as her residence. However, a tenant being readily available, she decided to rent the property and did so at an initial rental of $220 per month. She continued to rent the property until 1976 when her last tenant, Joseph Wiley Cooper, an Episcopal priest, moved out. Reverend Cooper, his wife and small child, liked the property and made inquiry of plaintiff about buying it. Upon being quoted a sales price of $65,000 to $70,000 and facing an increase in rent, he moved out. Had the price been in the $40,000 to $50,000 range - something he could have afforded - he would have been interested in buying. Thereafter, plaintiff made certain

improvements to the property at a cost of some $9,000, and she and her adult son moved into the home as their permanent residence. She lived there from May 1977 until July 1978. Her son moved out some eight months later. Both plaintiff and her son developed physical ailments - fatigue, nausea, insomnia and heart palpitations - which they attributed to a lack of sleep and proper rest caused by the traffic noise from the two nearby streets. Although they did not seek medical attention for their ailments, the symptoms ceased when they moved out of the residence. Thereafter, plaintiff made some effort to rent or sell the property without success. She also requested the defendant to rezone the property from R-15, Residential, to P-2, Professional, which request was denied. This action followed.

Plaintiff contends:

1. That through its enforcement of its zoning ordinance and failure to amend the same as requested by plaintiff, the defendant has "taken" her property without just compensation in violation of the fifth amendment to the United States Constitution as made applicable to the states by the fourteenth amendment.

2. That the defendant's refusal to amend its zoning ordinance is "state action" and violates plaintiff's civil rights under Title 42, United States Code § 1983.

The Court has jurisdiction pursuant to 28 U.S.C. §§ 1331 & 1343(3). Having conducted a bench trial at which both parties presented evidence, the Court makes the following

FINDINGS OF FACT

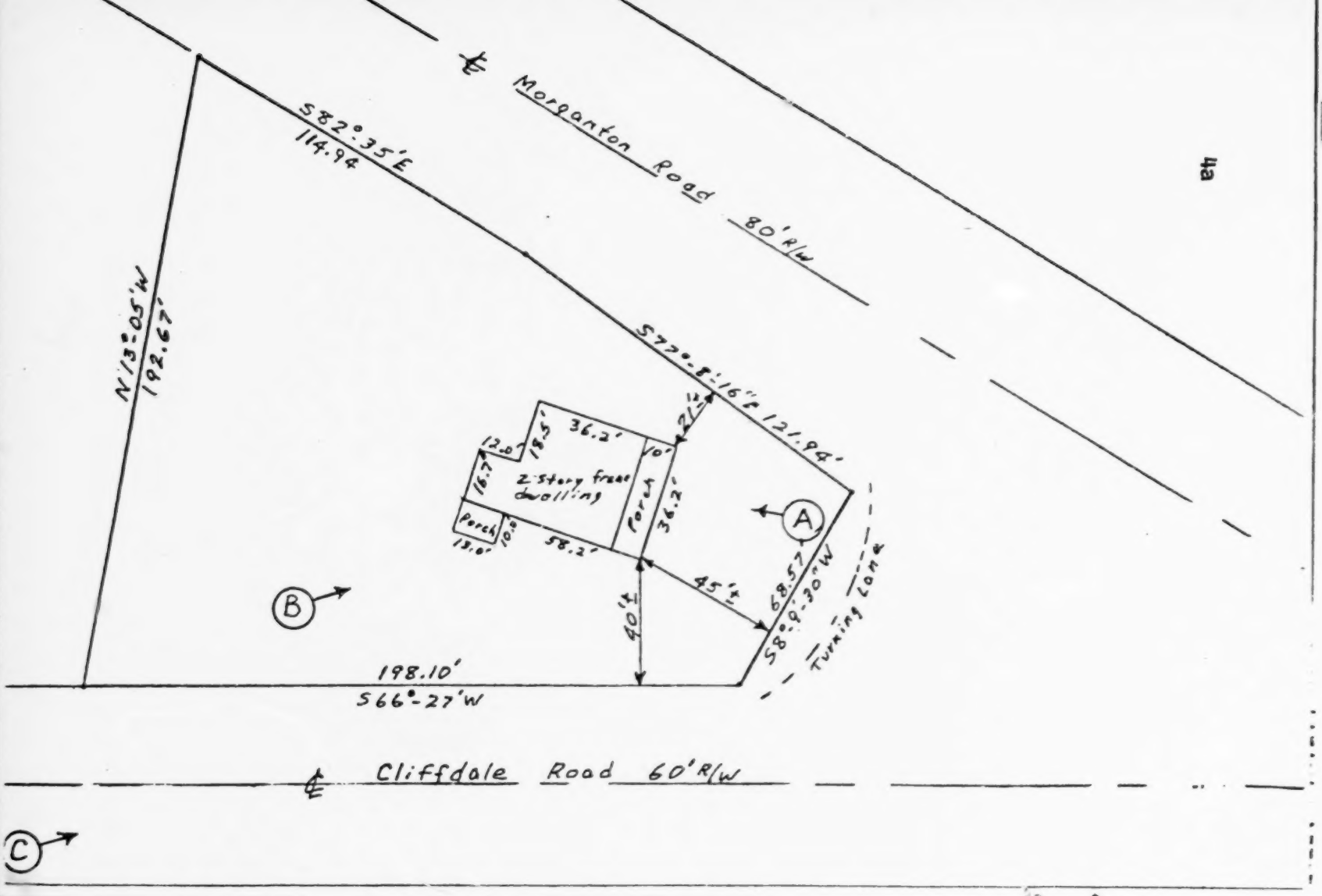
1. Plaintiff's property consists of a nearly triangular lot located at the intersection of Cliffdale Road and Morganton Road. She has 236.98 feet of road frontage on Mor-

ganton Road and 198 feet on Cliffdale Road. Rather than being pointed, the lot also has frontage on a turning lane connecting the two roads of 68.57 feet. Her remaining property line - running from Morganton Road to Cliffdale Road - is 192.67 feet long, giving her a total of 27,400 square feet. A plat is reproduced on the following page.

2. Located on the lot is a two-story, frame dwelling with paneled walls and aluminum siding. The downstairs contains 1,540 square feet of heated space and a screened porch of 362 square feet. The upstairs has 630 feet of heated floor space. The windows are single pane and are covered by screens. Shrubbery and other vegetation grows on the lot.

3. Throughout the time plaintiff has owned the property, Morganton Road has been four lanes and Cliffdale two lanes. In 1973, 608 square feet was acquired from plaintiff on which was constructed a turning lane for traffic exiting Morganton Road onto Cliffdale Road. Both roads are on an incline adjacent to plaintiff's property with that on Cliffdale being more pronounced. A traffic light controls the intersection.

4. In 1970, the traffic count on Morganton Road averaged 5,200 vehicles per day and on Cliffdale, 4,000. Thereafter, the average daily count increased until 1980 when it reached 14,400 on Morganton and 10,200 on Cliffdale. Since then, there has been a steady decline in the count - to 13,200 on Morganton and 9,500 on Cliffdale in 1981 and 13,000 on Morganton and 9,500 on Cliffdale in 1982. The increase during the 1970's was brought on by an explosive development west of plaintiff's property in the form of shopping centers and other businesses, schools and residences. The decrease since 1980 can be attributed to, among other things, the closing of a landfill and the prohibition of through trucks on the two roads.


Morganton Road 80' R/W
S82°-35'E
114.94
N13°-05'W
192.67'
S77°-8'-16"E 121.94'
198.10'
S66°-27'W
Cliffdale Road 60' R/W
2-story frame dwelling
Porch
Porch
36.2'
18.5'
12.0'
16.7'
15.0'
10.0'
58.2'
36.2'
10'
2'±
45'±
40'±
68.57
S8°-9'-30"W
Turning Lane
A
B
C

5. The increase in traffic has increased the noise level on all parts of plaintiff's property. In July 1981, A-Weighted Sound Level (dBA) on plaintiff's property ranged from 70 at a point adjacent to Morganton Road to 65 near the house to 55 inside the unoccupied house with the windows open. At the same time, the readings at the midpoint of the back property line and the middle of the back yard were each 56 dBA.

6. Loud noises can be harmful to health. As the level increases, so does the potential for harm. Various agencies have different criteria for acceptable noise levels. For example, the United States Department of Housing and Urban Development has a goal for sites for approved projects of 55 dBA (exterior) but it will accept up to 65 dBA. Exposure to sounds above 70 dBA for a long time will likely cause harm to hearing.

7. Plaintiff's property is located in a large residential area in the Fayetteville-Cumberland County Land Use Plan. The nearest business of profession lies at or near McPherson Church Road, approximately one mile distant.

8. Plaintiff's request for a rezoning of her property was acted on by defendant in accordance with its zoning ordinance. After the petition was filed, notices were posted for a public hearing before the Planning Commission. At that hearing, plaintiff's son appeared on her behalf and other interested parties appeared in opposition. The planning staff recommended that the request be denied for the following reasons:

> 1. That the Land Development Plan provides the low density residential development in the area. . .
>
> 2. That the combination of site configuration, sharp grades in the area and the steep intersection makes this site inappropriate and potentially hazardous for

the nonresidential development due to increased traffic generated and restrictive site clearance.

The request was denied by unanimous vote.

Thereafter, after notice, another hearing was held before the City Council which unanimously upheld the decision of the Planning Commission.

9. On 22 November, 1981, plaintiff's property had a fair market value of $40,000.

CONCLUSIONS OF LAW

A. THERE HAS BEEN NO "TAKING" OF PLAINTIFF'S PROPERTY BY THE DEFENDANT. The Court does not doubt that plaintiff and her son were not comfortable living in the property **in its present state.** However, this doesn't mean that the property wasn't usable as a dwelling. Her former tenant, Reverend Cooper, liked the property. He testified: "We enjoyed it. We liked that space. I liked the yard. . . It was like living in the country. . ." With regard to the effect of the traffic noise on sleep patterns, he testified: "The only difficulty I had was when we first moved in . . . after I adjusted. . . I was all right. We would sleep in the summer with the windows up because we didn't have air conditioning. So, it wasn't a problem with me."

Plaintiff installed central air conditioning in the house when she lived there. However, there were many other options open to her if, indeed, she wanted to use the property herself. Her own acoustical expert testified that the installation of storm doors and windows and wall insulation would have helped. Likewise, the house could have been moved to the rear of the lot. More importantly, however, the Court feels that plaintiff's efforts to rent or sell the property have been perfunctory, at best.

B. DEFENDANT'S FAILURE TO AMEND ITS

ZONING ORDINANCE AT PLAINTIFF'S REQUEST DID NOT DENY HER ANY REASONABLE, PRACTICAL AND DESIRABLE USE OF HER PROPERTY. It would appear that plaintiff presented the same reasoning and arguments to the Planning Commission and City Council of the defendant City that she has to this Court. Fulfilling its legislative function, the defendant listened to other affected citizens and its professional staff before making a decision it believed to be in the best interest of all of its citizens. Plaintiff has failed to show that defendant's decision was arbitrary, capricious or an abuse of discretion.

According to the witness, R. Cecil Carlyle, an appraiser who plaintiff hired to appraise the property in 1981, it had a fair market value then for professional office use of $88,000. Thus, plaintiff's property is obviously of less value under its present zoning classification than it would have been had her rezoning request been approved. However, the Supreme Court of the United States has held a landowner has no right to a more favorable zoning classification merely to effect an increase in its value. *Penn Central Transportation Co. v. City of New York,* 438 U.S. 104, 129-130 (1978).

Had defendant, through zoning or failure to zone, rendered plaintiff's property valueless or useless, she would be entitled to just compensation. *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393 (1922). Such is not the case here.

Zoning laws and land use plans are adopted for the benefit of the citizenry as a whole. At times, that which results in an advantage to one citizen results in a disadvantage to another. This is one of the prices of living in an urban society.

The difference in the tolerance level for sound, or noise, is well known. What parent can endure for more than a few minutes the blare of rock music emanating from a radio or tape player that his teenage son or daughter soundly sleeps by for twelve hours? In the case at bar, that which proves sickening to Mrs. Schmidt was no bother at all to Reverend Cooper.

Finally, the choice of a housing site is intensely personal. There are those who thrive on constant contact with neighbors; yet others yearn for the solitude of a cabin in the mountains or by the sea. Mrs. Schmidt, no doubt, belongs to the latter group. The former must have been in the mind of the poet, Sam Walter Foss, who wrote:

> Let me live in a house by the side of a road,
> Where the race of man go by -
> The men who are good and the men who are bad,
> As good and as bad as I.
>
> . . .
>
> Then why should I sit in the scorner's seat
> Or hurl a cynic's ban?
> Let me live in my house by the side of the road
> And be a friend to man.

Foss, The House By the Side of the Road, in *The Family Book of Best Loved Poems 64* (D. George 1952).

In modern society, living in a house by the side of the road has its price.

Plaintiff, having failed to prove her case, judgment will be entered for the defendant.

AND IT IS SO ORDERED.

This _____ June 1983.

W. EARL BRITT
United States District Judge

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 83-1672

Before RUSSELL AND WIDENER, Circuit Judges and HAYNSWORTH, Senior Circuit Judge.

PER CURIAM:

A review of the record and the district court's opinion discloses that this appeal from that court's order granting judgment for the defendant is without merit. We cannot conclude, based on the record, that the district court's findings of fact are clearly erroneous. Fed. R. Civ. P. 52(a). Although the appellee admits that there was one erroneously-stated fact in the opinion, that particular fact was not of such significance as to amount to more than harmless error. 28 U.S.C. § 2111. Finally, the appellant was precluded from raising at trial, and therefore may not raise on appeal, issues which were not raised in the pre-trial order or an amended pre-trial order. **See** J. Moore, 3 **Moore's Federal Practice,** paragraph 16.19 at 16-42 (2d 1983).

Because the dispositive issues recently have been decided authoritatively, we dispense with oral argument and affirm the judgment below on the reasoning of the district court. **Schmidt v. City of Fayetteville,** C/A No. 81-78-CIV-3 (E.D.N.C., June 28, 1983).

AFFIRMED.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
FAYETTEVILLE DIVISION
No. 81-78-CIV-3

MARY NELL SCHMIDT, Plaintiff	)
	) PRE-TRIAL
vs.	) ORDER
CITY OF FAYETTEVILLE, Defendant.	)

Date of Conference: May 10, 1983

Appearances: H. Gerald Beaver
Attorney for Plaintiff
914 Hay Street
Fayetteville, N.C. 28305

L. Stacy Weaver, Jr.
Attorney for Defendant
222 Maiden Lane
Fayetteville, N.C. 28301

I. **STIPULATIONS:**

A. All parties are properly before the Court;
B. The Court has jurisdiction of the parties and subject matter;
C. All parties have been correctly designated;
D. There is no question as to misjoinder or non-joinder of parties.

E. Facts:

1. Plaintiff is a citizen and resident of Cumberland County, North Carolina.

2. Defendant is a municipal corporation existing as a political subdivision of the State of North Carolina having been duly chartered by act of the General Assembly of North Carolina.

3. That Plaintiff is the owner of a parcel of land situated in Cumberland County, North Carolina, said tract being more particularly described as follows:

BEGINNING at the intersection of Morganton Road and a road now called the Cliffdale Road, formerly called the Rockingham or Chicken Road, and running thence with the aforesaid Cliffdale Road South 66 degrees 27 minutes West 350.8 feet to a stake, thence North 13 degrees 05 minutes West 192.67 feet to a stake in the southern margin of Morganton Road; thence with the said road South 32 degrees 35 minutes East 367.4 feet to the BEGINNING, according to a plat of same by Sol C. Rose, Registered Surveyor, dated August 1952, and duly recorded in Plat Book 14, Page 58, Cumberland County Registry.

The above-described tract of land is that same tract conveyed to Mary Nell Schmidt by deed dated December 16, 1970, recorded in Book 2238, Page 379, Cumberland County Registry.

4. On March 13, 1961, the City of Fayetteville, North Carolina, pursuant to Chapter 160 of the General Statutes of the State of North Carolina, adopted a municipal zoning ordinance, being Chapter 32 of the Code of Ordinances for the City of Fayetteville; that at all times since the enactment of the municipal zoning ordinance, the Plaintiff's property has been zoned for residential use

and presently is zoned in a "R-15 Residential" district.

5. That in 1980, the Plaintiff, pursuant to the municipal zoning ordinance of the City of Fayetteville, petitioned the City Council of the City of Fayetteville to rezone her property to the classfication of "P-2 Professional"; that said petition was denied by the City Council of Fayetteville on or about July 28, 1980.

F. **Legal Issues:**

1. The Plaintiff contends that the legal issues are as follows:

a. Has the Defendant, City of Fayetteville, under color of state law, through its enforcement of the municipal zoning ordinance with respect to Plaintiff's property and through its City Council's refusal to amend the municipal zoning ordinance with respect to Plaintiff's property, denied the Plaintiff any reasonable and desirable use of her property without just compensation therefor and without due process of law in violation of the 5th and 14th Amendments to the Constitution of the United States?

b. Has the Plaintiff been injured and damaged by the actions of the Defendant?

c. What amount, if any, is Plaintiff entitled to recover from the Defendant as compensatory damages, including attorney's fees?

2. If the Defendant's Motion for Summary Judgment is overruled, then the Defendant contends that the legal issues listed by the pleadings are as follows:

a. Was there a threatened deprivation by the Defendant of the Plaintiff's rights under the color of any state statute of the State of North Carolina of any rights, privileges, and immunities secured to the Plaintiff by the

Constitution of the United States?

b. Do the laws of the State of North Carolina provide any right of appeal from a refusal by a city council to amend a zoning ordinance?

c. Did the refusal of the Defendant to rezone the Plaintiff's property constitute an interference so substantial as to render the Plaintiff's property worthless or useless?

d. Did the Plaintiff give the Defendant six (6) months notice before bringing her action, as required by North Carolina General Statutes, Section 1-539.15?

e. Did the Plaintiff bring her claim within nine (9) months of the denial of her requested rezoning as required by North Carolina General Statutes, Section 1-54.1 and 160A-364.1?

f. Is the Defendant, as a municipal corporation created by act of the North Carolina General Assembly, entitled to immunity against actions brought under 42 U.S.C. Section 1983 and Section 1988 where it acts in good faith in a legislative capacity?

g. Is the Defendant immune from the Plaintiff's cause of action as being an action against an agency of the State and under the 11th Amendment to the United States Constitution?

h. Has the Plaintiff failed to exhaust any other remedies available to her in accordance with the laws of the State of North Carolina prior to bringing her action against the Defendant?

i. Does the Plaintiff lack standing to sue this Defendant under 42 U.S.C., Section 1983?

The Defendant contends that these issues are applicable to both of the Plaintiff's claims.

II. CONTENTIONS:

A. Plaintiff:

1. Facts:

(a) That since the initial zoning of Plaintiff's property as "R-15 Residential" in 1961, there has been a substantial change in the character and nature of the Plaintiff's property and surrounding area so as to render Plaintiff's property wholly unsuitable and unfit for use as residential property.

b. That in 1980, the City Council of the Defendant refused to rezone said property to a "P-2 Professional" classification and has thus denied to the Plaintiff any reasonable and practical use of said premises, unreasonably and capriciously.

c. That such actions by the Defendant in enforcing its zoning ordinance and refusing to modify same as reflects changes in it and the surrounding community has violated Plaintiff's rights not to be deprived of the property without just compensation therefor without due process of law.

d. That because of the aforesaid actions by the Defendant, the Plaintiff has been damaged monetarily.

B. The Defendant contends that there are no material issues of fact as stated in its Motion for Summary Judgment, but that the following are some of the facts which it would offer proof to support if such motion is overruled:

a. That the Plaintiff purchased her property in 1970 at a time when it was zoned "R-15 Residential" and when the character of the neighborhood where the Plaintiff's property is located was predominantly residential in character; that the neighborhood and the Plaintiff's property have remained predominantly residential in

character throughout the entire time when the Plaintiff has had ownership of the property.

b. That the Plaintiff has not been deprived of any reasonable, economically viable use of her property so as to render it worthless or useless. In fact, the Plaintiff's property is worth at least $40,000.00 according to expert appraisers, and was on the tax books in 1982 for $31,092.00, that the Plaintiff received rent from the property until she chose to occupy it herself in 1978.

c. That in refusing to rezone the Plaintiff's property in 1980, the Defendant acted in good faith and under the cloak of immunity of municipal corporations.

d. That the Plaintiff has not been damaged monetarily as a result of the refusal of the Defendant to rezone her property.

III. **EXHIBITS:**

A. Plaintiff:

1. Noise survey and analysis of the Schmidt Property at Morganton and Cliffdale Roads, Fayetteville, North Carolina, by Dr. Norel D. Stewart, PhD., Suite 300 975 Walnut Street, Cary, North Carolina 27511. (The Defendant objects as being hearsay, irrelevant and immaterial.)

2. Cumberland County Environmental Health Division Study of traffic noise of the property of Mary Nell Schmidt presented to the City Council of the City of Fayetteville on or about July 28, 1980. (The Defendant objects as being hearsay, irrelevant and immaterial.)

3. Analysis of triangular lots and property as to zoning status within the City of Fayetteville derived from zoning map of the City of Fayetteville. (The Defendant objects as being hearsay, irrelevant and immaterial.)

4. Municipal Zoning Ordinance of City of Fayetteville.

5. Plat of Subject Premises.

6. Photo of typical traffic scene at subject property. (The Defendant objects as being hearsay, irrelevant and immaterial.)

7. Photo of typical traffic scene at subject property. (The Defendant objects as being hearsay, irrelevant and immaterial.)

8. Photo of typical traffic scene at subject property. (The Defendant objects as being hearsay, irrelevant and immaterial.)

9. Photo of typical traffic scene at subject property. (The Defendant objects as being hearsay, irrelevant and immaterial.)

10. Photo of typical traffic scene at subject property. (The Defendant objects as being hearsay, irrelevant and immaterial.)

11. Photo of typical traffic scene at subject property. (The Defendant objects as being hearsay, irrelevant and immaterial.)

12. Photo of typical traffic scene at subject property. (The Defendant objects as being hearsay, irrelevant and immaterial.)

13. Noise Ordinance of City of Fayetteville. (The Defendant objects as being hearsay, irrelevant and immaterial.)

A. Defendant:

1. Appraisal of the subject property by R. Cecil Carlyle, M.A.I. (Objection, hearsay)

2. Tax notices on the subject property. (Objection, relevance hearsay, self-serving declaration)

3. Plaintiff's answers to interrogatories.

4. Minutes of the Planning Board and the City Council.

IV. WITNESSES:

A. Plaintiff:

1. Mary Nell Schmidt, 5303 Raeford Road, Fayetteville, North Carolina. Background and unuseability of property as residence.

2. Robert Michael Schmidt, III, 5303 Raeford Road, Fayetteville, North Carolina. Background and unuseability of property as residence.

3. Norel D. Stewart, Suite 300, 975 Walnut Street, Cary, North Carolina. Noise survey on subject property.

4. Clarence Hemminger, 6448 Yadkin Road, Fayetteville, North Carolina. Unsuitability of property for residential use.

5. Billy E. Alexander, 5334 Raeford Road, Fayetteville, North Carolina. Unsuitability of subject property for residential use.

6. Bernard E. Cashwell, 4908 Raeford Road, Fayetteville, North Carolina. Reconstruction costs of subject property.

B. Defendant:

1. R. Cecil Carlyle, 241 Green Street, Fayetteville North Carolina. Appraisal of the subject property.

2. Crawford McKethan, 241 Green Street, Fayetteville, North Carolina. Appraisal of the subject property.

3. Cliff Strassenburg, 1622 Van Buren Avenue, Fayetteville, North Carolina. Planning Board Director to explain action of Planning Board.

4. G. Allen Mitchell, 4631 Keg Court, Fayetteville, North Carolina. Assistant to Planning Board Director for background on zoning and study of property.

5. Reverend Joe Cooper, 4925 Oriole Drive, Wilmington, North Carolina. Condition of occupancy and Mrs. Schmidt's value of the property.

6. Robert C. Cogswell, Jr., Post Office Drawer 1513, Fayetteville, North Carolina. North Carolina municipal law of zoning.

V. PENDING MOTIONS:

Both Plaintiff and Defendant have Motions for Summary Judgment pending in this matter.

VI. BURDEN OF PROOF:

Plaintiff has burden of proof as to each issue.

Trial time estimate: Two (2) days.

RESPECTFULLY SUBMITTED this 1st day of June, 1983.

H. GERALD BEAVER
of Counsel for Plaintiff

L. STACY WEAVER, JR.
of Counsel for Defendant

APPROVED:

U.S. MAGISTRATE

Date: _____

84-1026

Office - Supreme Court, U.S.
FILED
DEC 14 1984
ALEXANDER L. STEVAS,
CLERK

NO. 83-1672

In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

MARY NELL SCHMIDT,

Petitioner,

v.

CITY OF FAYETTEVILLE,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE FOURTH CIRCUIT COURT OF APPEALS

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STATEMENT OF THE CASE

The Petition for Writ of Certiorari, originally filed by the Petitioner's attorney-son (who testified in the case) but converted to a pro se Petition, erroneously states in the first paragraph that the United States Court of Appeals for the Fourth Circuit made an error which "resulted in the exclusion of evidence demonstrating severe zoning discrimination, . . . " (Petition, p. 2) The evidence which the Petitioner complains of was in fact admitted by the trial court, as the Petitioner further demonstrates in her Petition at page 5 (where she quotes from a page of the trial transcript which was not included in the appendix by the Petitioner in her appeal to the Fourth Circuit Court of Appeals). Even if the Petitioner had

requested that the Clerk of the Court of Appeals certify the record under Rule 19 of the United States Supreme Court Rules, the matters set out on page 5 of the Petition would not have been included because they were not designated by the Petitioner as a part of the appendix to the Fourth Circuit Court of Appeals. This does not comply with Rule 34.1(g) of the Rules of the United States Supreme Court.

Notwithstanding the Petitioner's insistence that the " . . . preclusion (of evidence) has resulted in serious prejudice to . . . the Petitioner," the evidence was in fact received at the trial stage.

The Petitioner included in her statement of the case certain selective facts from the trial, but failed to

include many of those which buttress Judge Britt's findings. There are, however, ample facts in this record to sustain not only Judge Britt's judgment and his findings but also the per curiam opinion of the Fourth Circuit Court of Appeals when it determined that the case presented no new issues which had not already been "decided authoritatively." (Appendix B, p. 11A of the Petition) The only question which the Petitioner raises by her statement of the case seems to concern the weight to be given the evidence which was admitted by Judge Britt.

The Petitioner alleged in her Complaint, First Claim for Relief:

> that the City of Fayetteville, through its enforcement of the Municipal Zoning Ordinance with respect to Plaintiff's property and through its City Council's refusal

> to amend the Municipal Zoning Ordinance with respect to Plaintiff's property, denies Plaintiff any reasonable, economically viable use of her property; that the City of Fayetteville, under Color of State Law, has deprived the Plaintiff of her right not to be deprived of her property without just compensation therefor and without due process of law, as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution. (Complaint, paragraph XI)

The Second Claim for Relief alleged that the matters set out in the First Claim for Relief:

> have deprived the Plaintiff of her right not to be deprived of her property without just compensation therefor and without due process of law, as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution; that the Plaintiff is entitled to recover pursuant to the provisions of 42 U.S.C., §1983, and is further entitled to recover pursuant to the provisions of 42 U.S.C., §1988. (Complaint, Second Claim for Relief, paragraph III)

In the Pre-Trial Conference, the parties were unable to agree upon the

legal issues to be submitted to the Court for determination; however, under the guidance of United States Magistrate Leonard, the contentions of each party as to the legal issues involved were stated. The Plaintiff's issues were stated as follows:

> a. Has the Defendant, City of Fayetteville, under Color of State Law, through its enforcement of the Municipal Zoning Ordinance with respect to Plaintiff's property and through its City Council's refusal to amend the Municipal Zoning Ordinance with respect to Plaintiff's property, denied the Plaintiff any reasonable, practical and desirable use of her property so as to deprive the Plaintiff of her property without just compensation therefor and without due process of law in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States?

The other issues contended by the Petitioner related to damages and attorney's fees.

The Petitioner also stated her contentions as to the facts in the Pre-Trial Order as follows:

(a) That since the initial zoning of Plaintiff's property as "R-15 Residential" in 1961, there has been a substantial change in the character and nature of the Plaintiff's property and the surrounding area so as to render Plaintiff's property wholly unsuitable and unfit for use as residential property.

(b) That in 1980, the City Council of the Defendant refused to rezone said property to a "P-2 Professional" classification and has thus denied to the Plaintiff any practical and desirable use of said premises, unreasonably and capriciously.

(c) That such actions by the Defendant in enforcing its zoning ordinance and refusing to modify same as reflects changes in it and the surrounding community has violated Plaintiff's rights not to be deprived of her property without just compensation therefor without due process of law.

(d) That because of the aforesaid actions by the Defendant, the Plaintiff has been damaged monetarily.

The case was tried upon the theory of an inverse condemnation. At the conclusion of the evidence, the trial court rendered judgment for the Defendant. The judgment was affirmed on appeal to the Fourth Circuit Court of Appeals.

SUMMARY OF THE ARGUMENT

1. This Petition should not be granted because it does not meet the considerations governing review on certiorari set out in Rule 17 of the United States Supreme Court Rules.

2. The Petition should not be granted because the Petitioner's real argument concerns the weight to be accorded to evidence which was received.

3. The Petition should not be granted because the Petitioner should not be allowed to change the theory of her case after her evidence has been

received, and she has stipulated to the issues in the Pre-Trial Order.

ARGUMENT

1. Rule 17 of the United States Supreme Court Rules specifies the considerations governing review on certiorari. In this case, an appeal from a federal Court of Appeals, Petitioner has not set out any of the grounds provided in Rule 17.1(a). She has pointed to no conflicting decisions with another federal Court of Appeals, nor has she indicated that the Fourth Circuit Court of Appeals has decided a federal question in a way which conflicts with a state court of last resort. Neither has she indicated that this case in any way departs from "accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower

court, as to call for an exercise of this Court's power of supervision." Rule 17.1(a).

The only remaining consideration would be whether or not the Fourth Circuit Court of Appeals had decided an important question of federal law which has not been settled by the Supreme Court of the United States, or had decided a federal question in conflict with the decisions of the Supreme Court of the United States as provided in Rule 17.1(c). The Petition is devoid of any argument that the decision of the Court of Appeals, in affirming the District Court, will have any national significance for litigants.

The Petitioner does not point out in her Petition any way in which this Petition complies with the considerations

required by Rule 17. It therefore should not claim the attention of this Court, as a decision by the Supreme Court of the United States in this matter would furnish no useful guidelines or standards to trial courts acting in obedience to them.

2. Petitioner's real argument seems to be, not that the evidence was refused, but that the trial judge did not accord it the same kind of weight that the Petitioner had hoped and did not adopt the Petitioner's new theory of the case. The trial judge, acting as judge and jury in this case, was the appropriate determiner of the weight and credibility of the evidence. The Petitioner complains that her evidence was not "addressed", but, in reality, the Petitioner means that the Court did not accept it

and adopt it. The Supreme Court does not grant the writ of certiorari merely to review evidence or inferences to be drawn from that evidence. Gen. Talking Pictures Corp. v. W. Elec. Co., 304 U.S. 175, 82 L.Ed. 1273, 58 S. Ct. 849 (1938).

In any event, the Petitioner cannot complain in this instance because the evidence received was favorable to her. At trial, the Respondent objected to the evidence adduced by the witness, Robert Michael Schmidt, III, the Petitioner's son, concerning certain other properties located within the City of Fayetteville as being irrelevant to this proceeding. (Transcript Vol. 2, p. 7) In ruling upon the motion, the District Court observed that the "Pre-Trial Order does not set forth at all any contention that the ordinance should be used (ruled) as

unconstitutional and (as) applied to your client. And the local rules of this court provides that any contention not set forth in the Pre-Trial Order are deemed abandoned." (Transcript Vol. 2, p. 11)

The admission of evidence is generally held to be harmless if it is favorable to the complaining party. United States v. Roberts, 62 F.2d 594 (10th Cir. Colo. 1932); Maryland Cas. Co. v. Kern County, 83 F.2d 774 (9th Cir. Cal. 1936). The complaining party has the burden of showing that he was injured by the admission of the evidence. Haywood v. United States, 268 F. 795, (7th Cir. Ill. 1920) cert. denied, 256 U.S. 689, 65 L.Ed. 1172, 41 S. Ct. 449. The burden is on the complaining party to show from the record as a whole that he

was deprived of some substantial right. Morgan v. United States, 98 F.2d 473 (8th Cir. Ark. 1938), cert. denied, 305 U.S. 648, 83 L.Ed. 419, 59 S. Ct. 229, reh. den., 305 U.S. 374, 83 L.Ed. 437, 59 S. Ct. 248. Even though incompetent or immaterial evidence is introduced, it cannot be said to be prejudicial where the case is tried before the Court without a jury since there is a presumption that the Court considered only the competent evidence. Morris v. Williams, 149 F.2d 703 (8th Cir. Ark. 1945).

The Petitioner states that "only after the Court issued its unpublished opinion did it become apparent that the issue in evidence was not reviewed by the Court." (Petition, p. 13) On the contrary, there is a presumption that the Court did consider it.

3. The Petition should not be granted because the Petitioner should not be allowed to change the theory of her case after the evidence was received and she had stipulated to the issues in the Pre-Trial Order.

In the Pre-Trial Order, the Petitioner stated both the issues to be tried by the judge and gave her contentions as to the facts. In neither did the Petitioner raise the question of unconstitutional zoning discrimination as applied to her property. The District Court Judge ruled that, although the matter was contained in the pleadings (Transcript Vol. II, p. 9), it was not set forth in the Pre-Trial Order and was deemed to be abandoned under the local rules of Court. (Transcript Vol. 2, p. 11, Rule 26:04)

The Pre-Trial Order "controls the subsequent course of the action, unless modified at trial to prevent manifest injustice." 3 Moore's Federal Practice ¶16.19, pp. 16-40. "Nor is the Court required to make findings as to issues which have been eliminated from the case by the pre-trial order." Moore's, supra, at pp. 16-42; Fanchon and Marko, Inc. v. Hagenbeck-Wallace Shows Co., 624 F.2d 168 (9th Cir. 1980); Allen v. U.S. Steel Corp., 665 F.2d 689 (5th Cir. 1982); United States v. First Nat. Bank of Circle, 652 F.2d 882 (9th Cir. 1981).

After objection by the Respondent's counsel to the introduction of evidence concerning "similarly situated properties" as being irrelevant, the court received the evidence but commented that it was

not embraced within the Pre-Trial Order. At that time, counsel for the Petitioner made no attempt to amend the Pre-Trial Order, and such a failure to seek an amendment prevents the raising of the issue on appeal. Neuspickle v. City of Knoxville, Tennessee, 48 F.R.D. 441 (E.D. Tenn. 1969), where it is stated:

> The parties are bound by the issues in the pre-trial order and may not later inject a new issue except in exceptional cases . . . if present issues at the trial were not contained in the pre-trial order, he should have asked for an amendment to the pre-trial order.

The Petitioner's Petition complains loud and long concerning the nature and quality of the Pre-Trial Order adopted; she was nevertheless assisted by able counsel in both the formulation of the Pre-Trial Order and throughout the course of the trial.

Notwithstanding such assistance, the Petitioner complains that the Court did not assist properly in the formulation of issues for trial. In fact, a pre-trial hearing was held by the Magistrate when the Order was entered. It is not incumbent upon the hearing magistrate to forge an order defining the issues where the opposing parties are in complete disagreement. M.C.I. Com. v. Am. Tel. & Tel. Co., 708 F.2d 1081 (7th Cir. 1983). When such an order is entered, it should control the course of the trial, unless modified. Union Planters Nat. Bank v. Com. Credit, 651 F.2d 1174 (6th Cir. 1981), cert. denied, 454 U.S. 1124, 102 S. Ct. 792, 71 L.Ed.2d 111. The parties are bound by the Pre-Trial Order, and are not to introduce at trial issues other than those included in the Order.

McKinney v. Galvin, 701 F.2d 584 (6th Cir. 1983); Allen v. U.S. Steel Corp., 665 F.2d 689 (5th Cir. 1982).

While the Court is authorized to modify the order to prevent manifest injustice, it should not allow a new theory of the case to be injected. Solar Fuel Co. v. United Mine Workers, 346 F.Supp. 789 (W.D. Pa. 1972), aff'd 481 F.2d 1399, cert. denied, 416 U.S. 909. Where the pre-trial order precludes the raising of issues at trial, it also precludes their being raised on appeal. Hodges v. United States, 597 F.2d 1014 (5th Cir. 1979).

Since the Petitioner did not move to amend the Pre-Trial Order, she argues, alternately: that the issue was contained within the Order anyway (which it manifestly was not); that liberal Rule 15 of the

Rules of Civil Procedure allowing amendments to pleadings should apply to the Pre-Trial Order (even though such an amendment was never requested) and it should be considered as a de facto amendment; and finally that the Court should consider the issue on appeal even if there was no amendment to the Pre-Trial Order.

The Petitioner's Petition clearly shows that the exchange between the trial judge and the Petitioner's counsel indicated the necessity to amend both the Pre-Trial Order and the Complaint if the theory was to be changed. Notwithstanding the intimation, nothing was done. Nevertheless, the evidence was received and presumably weighed by the court in arriving at its judgment. The Petitioner should not be heard to complain at this stage of the proceedings

about the weight that the court accorded to that evidence. The substance of the Petitioner's argument in this regard seems to be that the Court did not find in her favor.

CONCLUSION

For the reasons stated, the Petition should be denied.

Respectfully submitted this 12th day of December, 1984.

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CERTIFICATE OF SERVICE

This is to certify that in accordance with Rule 28 of the Rules of the Supreme Court, I have on this day served the required three (3) copies of the Respondent's Brief in Opposition to Petition for Writ of Certiorari to the Fourth Circuit Court of Appeals by depositing same in a United States mail box with First-Class postage prepaid and addressed as follows to the Petitioner appearing pro se:

Mary Nell Schmidt
5303 Raeford Road
Fayetteville, NC 28304

This 12th day of December, 1984.

L. Stacy Weaver, Jr.